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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

On Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF PETITIONERS.

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EDITH ADELAIDE FIELD,

Respondent.

On Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF PETITIONERS.

I.

Opinions of the Courts Below.

The Findings of Fact and Conclusions of Law and Judgment of the District Court were rendered December 29, 1938, and will be found in the Transcript of Record, at pages 23, 24 and 25. There was no accompanying opinion. The opinion of the Circuit Court of Appeals for the Third Circuit was rendered December 20, 1939, and was reported under the title of "*Field* v. *Fidelity Union Trust Company, et al.*" in 108 Fed. 2d, 251, and is set forth in full in the record, (R. 29 to 48).

II.

Statement of Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was December 20, 1939. The petition for a writ of *certiorari* was filed March 16, 1940 and granted on April 22, 1940.

2. The petitioners claim (R. 9, 10 and 11) that, under and by virtue of the local law of the State of New Jersey, the petitioners are entitled to the entire balance of the bank account standing in the name of the decedent and designated "Edith M. Peck, in trust for Ethel Adelaide Field." Respondent asserts that she is the beneficiary named in said bank account and as such became entitled to the same upon the death of Miss Peck, (R. 3, 4, 5, 6 and 7).

3. The jurisdiction of the court to issue the writ of *certiorari* herein granted was invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Section 347).

III.

Statement of the Case.

The question involved in this case is whether the established decisions of the Court of Chancery of the State of New Jersey, construing the statute law of that State relating to the status of savings bank accounts created in that State and designated in the name of the creator thereof in trust for another, shall be binding on the Courts of the

United States in actions brought in those courts on such accounts.

On January 2, 1935, and prior to her death, Edith M. Peck caused the title of a certain savings bank account (the subject matter of this cause), standing in her name alone, to be transferred upon the records of the bank to the designation of "Edith M. Peck, in trust for Ethel Adelaide Field" (R. 19) retaining exclusive control over the account with the sole right of withdrawal therefrom, redesignation thereof and right of revocation of any previous disposition (R. 20) and gave no further notice of the existence of or terms of any trust affecting the account (R. 13) and created no other form of alleged trust.

Edith M. Peck subsequently died on January 6th, 1935, a resident and citizen of the City of Newark, County of Essex and State of New Jersey, leaving a last will and testament, duly admitted for probate before the Surrogate of that County on January 18th, 1935, whereby the petitioners herein were appointed executors and duly qualified as such. No mention was made in the will of the aforesaid savings account nor was the respondent named as a beneficiary therein (R. 27).

Subsequent to the institution of the suit below, the savings bank, which had been named a defendant therein, pursuant to order of the District Court of the United States for the District of New Jersey, caused to be paid into Court the sum of $4,230.66, being the balance of the account and upon such payment, was dismissed as a party defendant to the suit (R. 27).

The District Court found for these petitioners (R. 24) concluding:

1. That under the law of the State of New Jersey, the designation of the bank account "Edith M. Peck, in trust for Ethel Adelaide Field" did not create a trust in fact.

2. That the designation of the said bank account as aforesaid was in effect testamentary in character and as such did not comply with the statute of wills of the State of New Jersey.

3. That Edith M. Peck did not make a valid gift of the said bank account to the complainant, Ethel Adelaide Field.

4. That the complainant, Ethel Adelaide Field, has no right, title or interest in and to the proceeds of said bank account deposited with this Court.

5. That the defendants, Fidelity Union Trust Company and Minton H. Twinch, are entitled to a judgment directing that the amount of said fund deposited in this Court, less lawful disbursements, be paid to them as executors under the last will and testament of Edith M. Peck, deceased.

On December 29, 1938, in conformity with the above conclusions, a judgment was entered by the United States District Court decreeing that the sum of $4,230.66 be paid to the petitioners herein (R. 25).

The respondent (plaintiff below) appealed the judgment of the District Court to the United States Circuit Court of Appeals for the Third Circuit and the latter Court reversed the judgment of the District Court on the

grounds that an act of the Legislature of New Jersey (Chapter 40, p. 59, P. L. 1932, the full text of which is set forth in appendix A hereto) validated the so-called "tentative trust" and entitled the beneficiary for whom the deposit was made, in trust to the funds so deposited upon the death of the creator. In so holding the Court refused to be bound by or to follow the decisions of the Court of Chancery of the State of New Jersey (*Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers* v. *Reid,* 119 N. J. Eq. 416, 182 Atl. 908) construing such statute to be ineffectual to create such rights in such a beneficiary, although it conceded that "the facts in these two cases cannot be distinguished from those here in question."

IV.

Specification of Errors.

A. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that the law of the State of New Jersey is the law expressed in the statute of that State as construed by said Court, and that it is not bound to follow decisions of the Court of Chancery of New Jersey in construing said statute.

B. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that under the local law of the State of New Jersey the bank account designated "Edith M. Peck in trust for Ethel Adelaide Field" was in fact a valid trust for the benefit of the beneficiary named therein.

C. The Circuit Court of Appeals for the Third Circuit erred in substituting its construction of the statute in question for that construction adopted by the Court of Chancery of New Jersey.

D. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decisions of the Court of Chancery of New Jersey, is in conflict with section 34 of the Judiciary Act of 1789 (now U. S. C. Title 28, Section 725), as construed by the cases of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 and *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1330.

E. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decision of the Court of Chancery of New Jersey is in conflict with the decision of the United States Supreme Court in the case of *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, 62 L. Ed. 1003, which reversed the Circuit Court of Appeals for the Third Circuit, which refused to follow a decision of the Supreme Court of New Jersey (*Barcolini* v. *Atlantic City and Shore Railroad Co.*, 81 Atl. 494, 82 N. J. L. 107), construing a New Jersey statute. As will appear hereinafter, the Supreme Court of New Jersey and the Court of Chancery are neither courts of last resort, but are of equal importance in the New Jersey judicial system.

V.

The Issue.

The issue involved herein is the narrow one of whether the Federal courts are bound to follow the construction placed upon a New Jersey statute by the Court of Chancery of that State in two independent decisions, or whether they may disregard that construction and arrive at their own conclusions as to the effect of the statute.

VI.

ARGUMENT.

Summary of the Argument.

POINT A—Under the law of the State of New Jersey, the mere designation of a bank account in trust for another is insufficient to constitute a valid gift or a valid declaration of trust.

POINT B—The Circuit Court of Appeals erred in refusing to apply the New Jersey statute as construed by the Court of Chancery of New Jersey.

POINT C—The Court of Chancery of New Jersey and the New Jersey Supreme Court are courts of equal rank and importance, both having statewide jurisdiction.

POINT D—In the absence of an authoritative decision of the state court of last resort, Federal courts should be bound by decisions of an important court of statewide jurisdiction.

POINT A.

Under the law of the State of New Jersey, the mere designation of a bank account in trust for another is insufficient to constitute a valid gift or a valid declaration of trust.

The mere designation of the bank account by Edith M. Peck "in trust for Ethel Adelaide Field" did not under the decisions of the highest court of the State of New Jersey create a valid trust entitling the named beneficiary to the fund. There must be some unequivocal act or declaration clearly showing that an absolute gift or trust was intended. *Nicklas* v. *Parker*, 69 N. J. Eq. 743, 61 Atl. 267, affirmed 71 N. J. Eq. 777, 71 Atl. 1135; *Johnson* v. *Savings Investment & Trust Co.*, 107 N. J. Eq. 547, 153 Atl. 383, affirmed 110 N. J. Eq. 466, 160 Atl. 371. In 1932 the legislature passed four statutes, P. L. 1932, Ch. 40, 41, 42 and 43 each in similar language, purporting to deal with tentative trusts. (The text appears in appendix A hereto p. 28). These statutes were construed by the Court of Chancery of New Jersey in *Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers* v. *Reid*, 119 N. J. Eq. 416, 182 Atl. 908, as ineffective to change the prior rules of law on this subject or to alter the legal requirements of either a gift *inter vivos*, or a valid trust. It is of some significance and adds to the importance of the decisions that the *Thatcher* and *Travers* cases were decided by two different Vice-Chancellors who reached the same result as to the 1932 act independently of the other. *Travers* v. *Reid, supra*, note at page 423. Since these two decisions the Court of Errors and Appeals has dealt with the problem of tentative trusts in

Cutts v. *Najdrowski*, 123 N. J. Eq. 481, 198 Atl. 885, and *Trust Co. of New Jersey* v. *Farawell*, 127 N. J. Eq. 45, 11 Atl. (2nd) 98, but has said nothing in either case bearing on the statutory law. The factual situation in the last two cited cases was such as to require no application of the statute in question.

Subsequent to the decision of the *Thatcher* and *Travers* cases the New Jersey legislature enacted a revision of the Laws of New Jersey in 1937. The 1932 Statutes in question appear as one statute as R. S. 17:9-4 of the Revision of 1937 (appendix B hereof, p. 34) without any change in language except as to the last sentence which in the 1932 Act appeared in the form of a proviso, but in the 1937 revision appears without such proviso. In no way is the sense or substance of the 1932 Act changed in the revision. *Crater* v. *Somerset County*, 123 N. J. L. 407, 8 Atl. (2nd) 691.

The adoption of the revision of 1937 has been held to be a re-enactment of the statutory law of a general nature as well as a revision superseding all such statutory law. *Devlin* v. *Cooper*, 124 N. J. L. 155, 11 Atl. (2nd) 29; *State* v. *Czarnicki*, 124 N. J. L. 43, 10 Atl. (2nd) 461. In *Ross* v. *Miller*, 115 N. J. L. 61, 178 Atl. 771, the Court quoting from Lewis' Sutherland Statutory Construction § 499 stated, at page 64-65: "The re-enacting of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed. So, where the terms of a statute which has received a judicial construction are used in a later statute, * * * that construction is to be given to the later statute; for if it were intended to exclude any known construction of a previous statute,

the legal presumption is that its terms would be so changed as to effectuate that intention". Accord: *Lynch* v. *Long Branch,* 111 N. J. L. 147, 167 Atl. 664; *Cook* v. *Bennett Gravel Co.* 90 N. J. L. 9, 100 Atl. 331. And such is the rule even though the construction of the statute was by an inferior court. *Bakelite Corporation* v. *National Aniline & Chemical Co.* 83 Fed. 2d. 176. Furthermore, the construction of the statute determined by the Court of Chancery has not been challenged in any other court in the State of New Jersey.

Although the Court of Chancery had construed the 1932 statute in 1936 in the *Thatcher* and *Travers* cases and such construction was adopted by the legislature by the enactment of the Revised Statutes in 1937, the Circuit Court of Appeals of the Third Circuit, conceding that "the facts in these two cases cannot be distinguished from those here in question", refused to follow these two cases on the ground that the Court of Chancery is not the "highest Court" of the State of New Jersey. Where a state statute has been construed by a competent court of statewide jurisdiction and such construction has been adopted by the legislature by re-enactment of the statute in question, it is submitted that it is not within the province of the Federal courts to make an independent determination of the law, and incidentally to pass judgment upon the merit of decisions of the State court on the same subject. It certainly cannot be said that the conclusions of the Court of Chancery as to the effect of the New Jersey statute under consideration were so erroneous as to warrant their abrupt rejection by the Circuit Court of Appeals. In fact, there is considerable justification in the construction arrived at by the Vice-Chancellors. Without deeming it necessary or

expedient to make an exhaustive analysis of the statutory text, we invite attention to that part of the act (Appendix A, page 28), which provides that where a deposit shall be made, etc.; and "no other or further notice of the existence of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank in the event of the death of the trustee"—the deposit shall be paid to the person in trust for whom said deposit was made, etc. As was pointed out in the *Thatcher* and *Travers* cases, *supra,* the operation of the statute is predicated upon the existence of a *legal* and *valid* trust. Under the New Jersey common law, a deposit made by A in trust for B, where A retains complete control and domination, does not create a valid trust, or in fact, any trust. The statutory law on the subject has not changed the common law.

POINT B.

The Circuit Court of Appeals erred in refusing to apply the New Jersey statute as construed by the Court of Chancery of New Jersey.

Whatever may have been the power of a Federal Court to apply its own conception of the Common Law of a State in cases where jurisdiction rested solely on diversity of citizenship the Federal Courts since *Erie R. R.* v. *Tompkins* must now (as said by Mr. Justice Reed in *Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, "search for and apply the entire body of substantive law governing an identical action in the state courts." Cf. *Rosenthal* v. *N. Y. Life Ins.*, 304 U. S. 263, 82 L. Ed. 1330.

As was said by Mr. Justice Holmes in his dissent in *Kuhn* v. *Fairmount,* 215 U. S. 349, at page 372, 54 L. Ed. 228, at page 239: "The law of a state does not become something outside of the state court, and independent of it by being called the common law. Whatever it is called, it is the law as declared by the state judges and nothing else", and quoting Mr. Justice Miller in *Brine* v. *Hartford Fire Ins.,* 96 U. S. 627, 24 L. Ed. 858, he says: "To administer a different law is to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other with no superior to decide which is right."

That the state law has not been declared by the highest court does not make it any the less the law so far as citizens of the state are concerned. If we are correct in our belief that the *Tompkins* and *Ruhlin* cases transmute the Federal courts into state courts *pro hac vice* where no federal question is involved then the fact that the highest court has not spoken is no excuse for a departure from the doctrine of *stare decisis.* Indeed in the *Ruhlin* case it appeared that there was no decision on the point by the highest court of Pennsylvania but only one by an intermediate appellate tribunal. And this court stated in the *Ruhlin* case that the Federal courts in determining the state law must broaden their inquiry "to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the Federal courts involving what were known as matters of 'local' law."

In conformity with the foregoing mandate Judge Clark in the case *sub judice* in the District Court for the District

of New Jersey found as part of the conclusions of law as follows: "1. That under the law of the State of New Jersey, the designation of the bank account 'Edith M. Peck, in trust for Ethel Adelaide Field' did not create a trust in fact" (R. p. 24).

It is submitted that what this court said in the *Tompkins* and *Ruhlin* cases is just as applicable to the Federal courts when a question of statutory construction is concerned. Indeed, prior to these decisions this court did not reject the construction of a state statute because the construction was not by the highest court in the State.[1]

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[1] See also, following the New Jersey Supreme Court, *Masino* v. *West Jersey & S. S. R. Co.*, 41 Fed. 2d 646, (CCA, 3d, 1930); *Murray* v. *Payne*, 273 Fed. 820 (CCA, 3d, 1921); *Island Development Co.* v. *McGeorge*, 26 Fed. 2d 841, (CCA, 3d, 1928), certiorari denied 278 U. S. 642; cf; *Dorrance* v. *Martin*, 12 Fed. Supp. 746 (Dist. Ct. D. New Jersey, 1935) affirmed 296 U. S. 393; and, following the Pennsylvania Superior Courts (not the highest court of Pennsylvania) *Taplinger* v. *Northwestern National Bank*, 101 Fed. 2d 274 (CCA, 3d, 1938); *Berlet* v. *Lehigh Valley Silk Mills*, 287 Fed. 769 (CCA, 3d, 1923); cf; *Steinbach* v. *Metzger*, 63 Fed. 2d, (CCA, 3d, 1933).

Further in *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, (1937) Mr. Chief Justice Hughes said at page 10: "The decision of the state court upon these questions is final * * *. It matters not that the decision was by an intermediate appellate court"; and in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, (1938) the cause was remanded to the District Court to determine the state law, whereupon, in *New York Life Ins. Co.* v. *Ruhlin*, 25 Fed. Supp. 65, (Dist. Ct. W. D. Pennsylvania, 1938) affirmed 106 Fed. 2d 65,

Thus in *Erie R. R.* v. *Hilt,* 247 U. S. 97, 62 L. Ed. 1003, it appears that the District Court for the District of New Jersey refused to follow the construction placed upon a statute by the New Jersey Supreme Court in *Barcolini* v. *Atlantic City & Shore R. Co.,* 82 N. J. L. 107, 81 Atl. 494, and rendered judgment for the plaintiffs which judgment was affirmed by the United States Circuit Court of Appeals for the Third Circuit. In reversing the judgment, Mr. Justice Holmes stated for this Court at pages 100-101: "The words of the Statute seem to us to require a different

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certiorari denied 84 Lawyers Ed. 417, rehearing denied 84 L. Ed. 532, the law of Pennsylvania was found to be established by a decision of that state's Superior Court "even though it may have been by an intermediate court of appeals", 25 Fed. Supp. 65 at 69.

In many other cases, decisions of courts lower than the highest court of the state have been followed; *In re Gilligan,* 152 Fed. 605 (CCA, 7th, 1906), certiorari denied 206 U. S. 563—Appellate Court of Indiana; American Optometer's Ass'n. *v.* Ritholz, 101 Fed. 2d 883, (CCA 7th, 1939), certiorari denied 307 U. S. 647—Illinois Appellate Court; Delaware and Hudson R. Corp. *v.* Bonzih, 105 Fed. 2d 541 (CCA, 3d, 1939)—Pennsylvania Superior and Supreme Courts; *In re Wicgand,* 27 Fed. Supp. 725, (Dist. Ct. S. D. California, 1939)—Appellate Department of the Superior Court of California; Gallagher *v.* Florida East Coast Ry., 196 Fed. 1000, (Dist. Ct. S. D. New York, 1912)—Appellate Division, New York Supreme Court. See also *Tipton* v. *Atchison, Topeka & Santa Fe R. R.,* 298 U. S. 141 (1936) wherein two decisions of District Courts of Appeal of California would have been followed had they only enunciated state law; but they were rejected for misconstruing a federal statute.

construction from that adopted, and they have been given their full literal meaning by the Supreme Court of the state in the case of an infant younger that the plaintiff. *Barcolini* v. *Atlantic City & S. R. Co.*, 82 N. J. L. 107, 81 Atl. 494. In view of the importance of that tribunal in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States even if we thought its decision more doubtful than we do." That the ground of decision in the *Hilt* case was the lack of power of the lower Federal courts to disregard the construction of a State Statute by a state court not the highest court must be inferred from the fact that Mr. Justice Day and Mr. Justice Clarke dissented on the sole ground that in the absence of a decision by the highest court of New Jersey holding otherwise, the Circuit Court was right in holding the Statute inapplicable.

In a later case involving the same statute *Erie Railroad Co.* v. *Duplak,* 286 U. S. 440 (1932), 76 L. Ed. 1214, Mr. Justice Sutherland said (p. 443):

> "However, the point is settled by the state law and effectually disposed of by the Hilt case."

The Circuit Court of Appeals for the Third Circuit (from whose decision the instant appeal is taken) has often followed the rule of the Hilt case:

Thus in *North Philadelphia Trust Co.* v. *Smith,* 13 Fed. 2d 585 (CCA, 3d, 1926), on error to the trial court in admitting a promissory note in evidence under New Jersey Supreme Court decisions, Circuit Judge Woolley said at page 586:

> "This was a decision of the Supreme Court of New Jersey, not by the Court of Errors and Appeals. That court, however, though not the highest court of the state, is, in the estimation of the Supreme Court of the United States, as shown in Erie *v.* Hilt, of such standing as to compel the courts of the United States to follow its pronouncements."

Indeed the Third Circuit has followed the Court of Chancery of New Jersey under the rule of the *Hilt* case in no less than three cases: *Greiman* v. *Metropolitan Life Ins. Co.*, 96 Fed. 2d 685 (CCA, 3d, 1938); *ex parte Zwillman*, 48 Fed. 78 (CCA, 3d, 1931), appeal dismissed 144 U. S. 310, the Circuit Court of Appeals followed the New Jersey Supreme Court whose decision was based on an opinion of the New Jersey Court of Chancery; and *Radin* v. *Commissioner of Internal Revenue*, 33 Fed. 2d, 39 (CCA, 3d, 1929), Circuit Judge Wooley saying at page 40:

> "But as the Court of Chancery of New Jersey has, we think, decided that this specific asset was real estate (the one fact omitted from the statement), there was no occasion for the Commissioner to consider and there is no warrant for this court to decide the question. The matter has been decided by a high state court of competent jurisdiction whose decision, involving a rule of property, federal tribunals must follow. De Vaugh *v.* Hutchinson, 165 U. S. 566, 570, 17 S. Ct. 461, 41 L. Ed. 827; Erie R. Co. *v.* Hilt, 247 U. S. 97, 100, 101, 38 S. Ct. 435, 62 L. Ed. 1003."

In its opinion below (R. 35) the Circuit Court distinguished this case on the ground that the Court of Chancery's decision constituted the question *res adjudicata*, but the opinion shows this not to have been the *ratio dec-*

idendi but rather the acceptance of the decision of the Court of Chancery as the law of the state. This is attested by its citation of the *De Vaugh* and *Hilt* cases, *supra.*

The rulings of the Court of Chancery of New Jersey carries equal weight with that of the New Jersey Supreme Court in the eyes of the Court of Errors and Appeals of New Jersey. Thus in *Ramsay* v. *Hutchinson,* 117 N. J. L. 222, 187 Atl. 650, the Court of Errors and Appeals in following a construction placed upon the Statute of Limitation by the Court of Chancery stated: "Irespective of the inherent merit of this construction a ruling uniformly made by the Supreme Court (or the Court of Chancery) over a course of years should not be set aside by us except for cogent and important reasons". (That the Court of Chancery is an important court in the New Jersey judicial system exercising state-wide jurisdiction with decrees appealable only to the Court of Errors and Appeals, the court of last resort, is more fully presented under Point C p. 19 *infra*).

Unless the Federal courts are bound to apply the construction of the Court of Chancery to the facts of this case, the abolition of inequality between a citizen of the State of New Jersey and a non-citizen in a Federal Court intended by the *Tompkins* case will not be fully achieved. As Circuit Court Judge Jones said in his dissenting opinion below (R. p. 47):

> "Concurrently with the decision of the majority, and growing out of the same New Jersey statute, there will be one rule of law for resident claimants who are committed to the courts of New Jersey, and a different rule for such non-resident claimants as

can, by reason of the mere accident of diverse citizenship and amount in controversy, invoke federal jurisdiction for the enforcement of their equally private and local claims. On the other hand, if we would but follow the decisions of the Chancery Court with respect to the particular statute here involved, it could make no difference from the standpoint of a claimant's rights whether his action was brought under federal or state jurisdiction. We should leave to the proper authority (Court of Errors and Appeals or State Legislature) any corrections of the Chancery Court's decisions that may be deemed advisable. This, we should do without speculation on our part as to what either the Court or the Legislature may do in the future. By so doing, we shall insure that the federal litigant will fare no differently or better than one in the State courts. Instead, however, the decision of the majority will serve to render the New Jersey statute non-uniform in its application, and, at the same time, we shall remain powerless to render this court's ruling dominant throughout the State or to change the law there obtaining. The intendment of the decision in Erie R. R. Co. *v.* Tompkins, *supra,* makes our duty, in such circumstances, equally evident where the question of local law rests on the construction of a State statute by a high state court of competent jurisdiction."

And again, (R. 46):

"Moreover, the decision of the majority leads directly to the situation where a statute of New Jersey when construed in chancery can never become the law of the State, so as to be binding on a federal court, until it has been passed upon and affirmed by the Court of Errors and Appeals, while the same statute when construed at law (Supreme Court of

New Jersey) will bind us, without utterance from the Court of Errors and Appeals, even though the decision is later taken to the latter court for review and there reversed. This resultant anomaly, of itself, argues strongly for our acceptance of the decisions of the Court of Chancery of New Jersey equally with the decisions of the Supreme Court of that State."

POINT C.

The Court of Chancery of New Jersey and the New Jersey Supreme Court are courts of equal rank and importance, both having statewide jurisdiction.

Since it has been uniformly held that the Courts of the United States are compelled to observe the decisions of the Supreme Court of New Jersey construing the statutes of that state as being declaratory of the law of that State (*Erie R. R.* v. *Hilt, supra; Erie Railroad Co.* v. *Duplak, supra;* and *North Philadelphia Trust Co.* v. *Smith, supra*), it necessarily follows that the decision of the Circuit Court of Appeals for the Third Circuit in the case under review, which, in effect, ignored the decisions of the Court of Chancery of New Jersey likewise construing a statute of that state, must be based on the reasoning that the Court of Chancery of New Jersey is not of equal rank or importance with the New Jersey Supreme Court. Such reasoning is patently erroneous.

In order to ascertain the importance of the Court of Chancery of New Jersey, it is proper to examine the history of the creation of that court. Originally, in 1705, Lord

Cornbury, by virtue of his commission as governor, established a court of chancery in which he and his council were to preside, and were "to hear and determine all causes and suits in said court which, from time to time, shall come before them, in such manner or as near as may be, according to the usage or custom of the high court of chancery, in the kingdom of England." This establishment continued in force until March 28th, 1770, when Governor Franklin, by virtue of his commission, in 1762, constituted himself chancellor and judge of the high court of chancery or equity of New Jersey. Governor Franklin continued in office until the first constitution of New Jersey was formed—July 2nd, 1776—and a few months after that event, on the 7th of October, 1776, the state legislature enacted that the several courts of law and equity of New Jersey, shall be confirmed and established, and continue to be held with the like powers under the present government as they were held at and before the Declaration of Independence.

During this formative period, and for a short time subsequent, the decrees of the court of chancery were not appealable, the power of the court of errors and appeals then being applicable alone to actions in the courts of common law. The court of chancery remained a court of last resort until the revision of 1799, when an appeal from the Court of Chancery was first permitted.

Penna. R. R. Co. v. *Nat. Docks Ry. Co.*, 54 N. J. E. 652;

In re appointment of Vice-Chancellors, 105 N. J. Eq. 759, 148 Atl. 750;

Appendix, 19 N. J. Eq. 577, 583.

In 1844, the present constitution of New Jersey was adopted and, under its provisions, appeals as a matter of right are now allowed from Chancery to the Court of Errors and Appeals, R. S. 2:29-117. Appeals from the Supreme Court are also directly to the Court of Errors and Appeals, R. S. 2:27-350. The constitution of 1844 established the judicial powers as follows:

"ARTICLE VI.

JUDICIARY.

Section I.

1. The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes as heretofore; a Court for the trial of impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts, and such *inferior* courts as now exist, and may be hereafter ordained and established by law; which *inferior* Courts the Legislature may alter or abolish, as the public good shall require. (Italics supplied.)

Section II.

1. The Court of Errors and Appeals shall consist of the Chancellor, the Justices of the Supreme Court, and six judges, or a major part of them; which judges are to be appointed for six years.

Section IV.

1. The Court of Chancery shall consist of a Chancellor.

2. The Chancellor shall be the Ordinary or Surrogate General, and judge of the Prerogative Court."

The demands of litigation upon the Chancellor resulted in expansion of the court as outlined by Chancellor Magie in *Gregory* v. *Gregory*, 67 N. J. Eq. 7, at pages 10-11, where he stated:

> "The introduction of Vice-Chancellors into our system of chancery jurisprudence arose from legislation based on the ancient right of the chancellor to call upon the masters of his court for their advice as to his action in causes and proceedings pending before him. When that legislation was first adopted, the business of the court had outgrown the power of the chancellor to dispose of it alone. For the purpose of enabling the court to deal with the increasing business therein, the legislature gave authority to the chancellor to appoint an officer, to be called a vice-chancellor, to whom he might refer causes for trial, and who might try the causes thus referred upon evidence orally taken, and was required to report to the chancellor his opinion and advise what decree should be made therein. As the business of the court still further increased the legislature, with wise liberality, from time to time has authorized the appointment of additional vice-chancellors, and by this system the court of chancery has practically been enabled to keep pace with its business. * * * The legislation on this subject has not attempted to deprive and it could not constitutionally deprive the Chancellor of his right to make the decrees of his court."

The judicial powers of the Vice-Chancellors are derived solely from the court and not from the legislature. *In re Appointment of Vice-Chancellors, supra.* And not only is the opinion of one vice-chancellor binding on all vice-chancellors, *Philadelphia and Camden Ferry Co.* v. *Johnson*, 94

N. J. Eq. 296, 297, but the Court of Errors and Appeals gives the same weight to the construction of a statute by the Court of Chancery as it does to a construction by the Supreme Court. *Ramsey* v. *Hutchinson, supra.*

It will be noted from the above that, under the Constitution of New Jersey, the Court of Chancery is clearly of equal importance with the State Supreme Court. As a matter of fact, when the various courts are referred to, the Court of Chancery is first mentioned next to the Court of Errors and Appeals (the court of last resort), and then the Supreme Court is mentioned. Both courts are of statewide original jurisdiction (*Cassatt* v. *First Nat'l. Bk. of West New York,* 9 N. J. Misc. 222, 153 Atl. 377). The Justices of the Supreme Court and the Chancellor both sit on the Court of Errors and Appeals, but *the Chancellor is the president of the Court of Errors and Appeals.* R. S. 2:1-3.

Even as to smaller details it clearly appears that both courts are equal. The terms of the justices of the Supreme Court and those of vice-chancellors are equal. The salaries are equal (the Chancellor and Chief Justice each receive $19,000.00, R. S. 2:2-2 and 2:4-3; the Vice-Chancellors and Associate Justices of the Supreme Court each receive $18,000.00 under R. S. 2:2-5 and 2:4-3). The statute law, referring to the Administration of Civil and Criminal Justice and to the Courts of New Jersey (R. S. Title 2) first treats of the Court of Errors and Appeals (Chapter 1), next the Court of Chancery (Chapter 2), next the Prerogative Court over which the chancellor presides as Ordinary (Chapter 3), next the Supreme Court (Chapter 4) and then in following chapters the various inferior courts.

Although, as stated in *Ludlow* v. *Ex'rs. of Ludlow,* 4 N. J. L. 451 and in *Whitehead* v. *Gray,* 12 N. J. L. 36, the Supreme Court has the superintendence of all *inferior* courts both civil and criminal, nowhere is it given superintendence over the Court of Chancery, nor has it ever attempted to assert such superintendence. Its jurisdiction is limited to law actions while the Court of Chancery is created as a court of equity. The decrees of the Chancery Court like the judgments of the Supreme Court are state-wide in effect and are appealable only to the Court of Errors and Appeals. There is no intermediate court of appeal empowered to review the decision of either.

POINT D.

In the absence of an authoritative decision by a state court of the last resort, the federal courts should be bound by the decisions of an important court of statewide jurisdiction.

It is not contended that the Federal courts are bound to follow the decisions of every state court, regardless of its importance in the judicial hierarchy or the extent of its areal jurisdiction. Obviously, such requirement would lead to absurd results.

What then, is the criterion? It is respectfully submitted that the decisions of an important state court whose jurisdiction is statewide may not, in the absence of an expression of the highest court, be disregarded; such decisions make "state law". The decisions of the state courts having less than statewide jurisdiction, are binding only upon the residents within their limited geographical area.

Such courts do not make "state law" and other state courts of like importance need not follow such decisions under the doctrine of *stare decisis;* such significance that they may attach to decisions of their neighboring tribunals is based simply upon principles of comity; there are numerous instances of sharp conflict.

Federal courts, charged with a duty to ascertain a state law, need not give greater weight to decisions of a local court than other courts in the same state but outside its territorial jurisdiction would accord, and are free to make an independent determination of the state law in the same manner and subject to the same limitations as such other state courts.

This distinction was suggested in the note in *Volume 53 of the Harvard Law Review, Number 5, page 880.* In this note, the Federal authorities have been collected to the effect that decisions of state courts of less than statewide jurisdiction have been disregarded, but that, where the jurisdiction is statewide, their decisions have usually been followed, although it is conceded that the Federal courts do not consciously make such distinction.

The independent determination of the state law by a Federal court, where the only local decisions are from courts of less than statewide jurisdiction, does not *ipso facto* give a non-resident advantage over the citizen, but where the jurisdiction of an important state court, such as the Court of Chancery of New Jersey, is statewide, its determination as to the prevailing state law is controlling and should be followed by Federal courts, particularly where its decisions have not been challenged for a period

of four years by any other court in the state and where the legislature, which has been in regular session each year thereafter, has made no attempt to modify or amend the statute in question as construed by the Court of Chancery, but instead re-enacted it.

The decisions of the Court of Chancery have become established as an essential part of the New Jersey jurisprudence and will so remain until altered by legislative enactment or reversed or overruled by the Court of Errors and Appeals. Until, however, any of the last mentioned events occur, those decisions are the law of the state. A non-resident suing in a Federal Court should not have the benefit of any different rule of law.

In the dissenting opinion of Mr. Justice Field in the case of *Baltimore and Ohio Railroad Company* v. *Baugh*, 149 U. S. 368, which was cited and quoted with approval by the United States Supreme Court in the case of *Erie Railroad* v. *Tompkins, supra*, there is the following statement at page 404:

> "In *Shelby* v. *Guy*, 24 U. S. 11 Wheat, 362, 365 (6:495, 496), this court, in considering the meaning to be given to the words 'beyond the seas', in a statute of limitations of Tennessee, said: 'That the statute laws of the states must furnish the rule of decision to this court so far as they comport with the Constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this

> admission may, at times, involve us in seeming inconsistencies, as, where states have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated *by the duty imposed on us to administer, as between certain individuals, the laws of the respective states, according to the best lights we possess of what those laws are'.*"

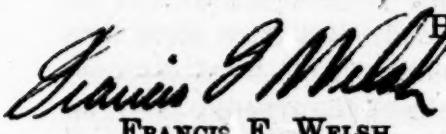
The italics are those of the opinion, but are re-emphasized in this brief.

As stated in the quotation, it is a duty of the Federal court to ascertain and administer the statutory construction according to the best lights it may possess as to what such construction may be. Where the statute has received a construction by an important state court which has become fixed by the efflux of time, such construction may not be disregarded by the Federal courts.

It is therefore respectfully submitted that the Circuit Court of Appeals for the Third Circuit erred in the case *sub judice* in refusing to follow the decisions of the Court of Chancery of New Jersey construing a purely local statute of that state and that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and that of the District Court for the District of New Jersey approved.

Respectfully submitted,

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tance of such minor or female shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the bank; *provided,* no minor shall withdraw any deposit in such minor's name from any account in which the first deposit was actually made by any person other than such minor, without the consent in writing of the person actually making such deposit, or his legal representative, if any, and if none, without the written consent of the natural or legal guardian of such minor.

Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made or to his or her legal representatives and the legal representatives of the deceased trustees shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

Whenever any deposit shall have been made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for

whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

3. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 42, New Jersey Session Laws of 1932.

A Supplement to "An act concerning banks and banking" (Revision of 1899), approved March twenty-fourth, one thousand eight hundred and ninety-nine.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made by any person in trust for another, and no other or further notice

of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 43, New Jersey Session Laws of 1932.

An Act to amend an act entitled "A supplement to 'An act concerning trust companies' (Revision of 1899), approved April eighth, one thousand nine hundred and three."

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be

paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

APPENDIX B.

New Jersey Revision of 1937; Title 17, Chapter 9, Section 4.

"*Deposits in trust in banks, savings banks or trust companies.* When a deposit has been or shall be made in a bank, savings bank or trust company by a person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust has been given in writing to the bank, savings bank or trust company, in the event of the death of the trustee, the same or any part thereof together with the dividends or interest thereon, shall be paid to the person in trust for whom the deposit was made, or to his legal representative and the legal representative of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee. If the person for whom the deposit was made is a minor, he shall not draw the deposit during his minority without the written consent of the legal representative of the trustee."